

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

Docket No. 74-1081

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant.

WILLIAM JEROME HARMON,

Appellee.

On appeal from the United States District Court
Northern District of New York

APPENDIX FOR APPELLANT,
UNITED STATES OF AMERICA

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York

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Syracuse, New York 13201
(315) 473-6660

Attorneys for Appellant.

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

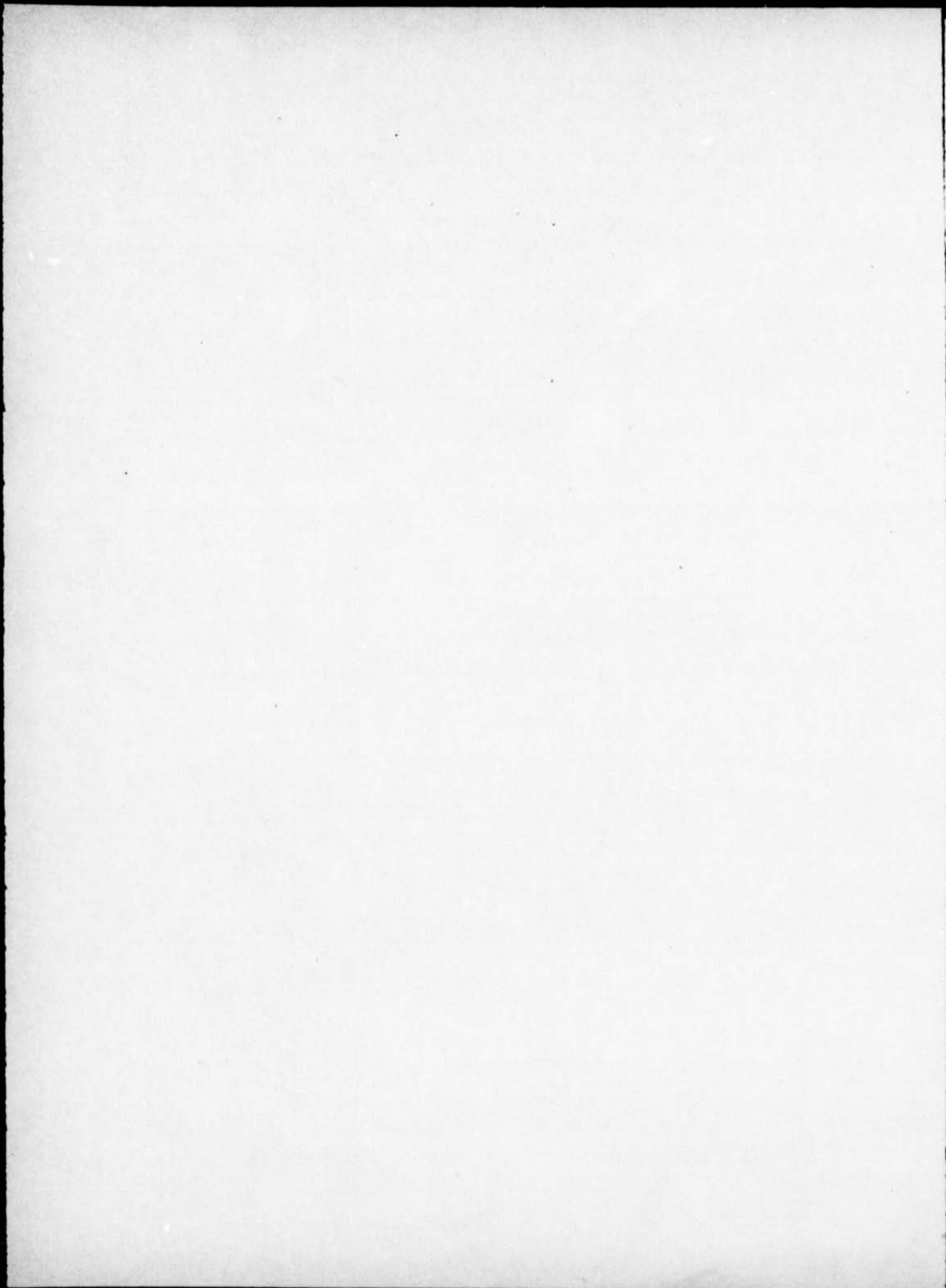
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Indictment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

WILLIAM JEROME HARMON

Criminal No. 73-CR-95
Vio: 18 USC 702 and 912.

I N D I C T M E N T

COUNT I

THE GRAND JURY CHARGES:

On or about the 5th day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Air Force and did falsely take upon himself to act as such in that he falsely stated to William Pennella that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to William Pennella to be a recently returned Vietnam Prisoner of War;

All in violation of Title 18, United States Code, §912.

COUNT II

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Air Force, and did falsely take upon himself to act as such in that he falsely stated to Elton Charles Klein that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity, WILLIAM JEROME HARMON, at the

Indictment.

time and place aforesaid, did falsely pretend to Elton Charles Klein to be a recently returned Vietnam Prisoner of War;

All in violation of Title 18, United States Code, §912.

COUNT III

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly and without authority, did wear the official uniform of a Sergeant of the United States Air Force;

All in violation of Title 18, United States Code, §702.

COUNT IV

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is a Sergeant in the United States Air Force, and did falsely take upon himself to act as such in that he falsely stated to Thomas Cawley that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to Thomas Cawley to be a recently returned Vietnam Prisoner of War;

All in violation of Title 18, United States Code, §912.

COUNT V

THE GRAND JURY FURTHER CHARGES:

On or about the 23rd day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON, wilfully and knowingly and without authority, did wear the official uniform of a Sergeant of the United States Air Force;

All in violation of Title 18, United States Code, §702.

Indictment.

COUNT VI

THE GRAND JURY FURTHER CHARGES:

On or about the 24th day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON wilfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is a Sergeant in the United States Air Force, and did falsely take upon himself to act as such in that he falsely stated in the presence of Elton Charles Klein that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to be a recently returned Vietnam Prisoner of War;

All in violation of Title 18, United States Code, §912.

COUNT VII

THE GRAND JURY FURTHER CHARGES:

On or about the 24th day of March, 1973, in the Northern District of New York, WILLIAM JEROME HARMON wilfully and knowingly and without authority did wear the official uniform of a Sergeant of the United States Air Force;

All in violation of Title 18, United States Code, §702.

A TRUE BILL

S. C. [Signature]
FOREMAN OF THE GRAND JURY

S. [Signature]
UNITED STATES ATTORNEY

**Defendant's Notice of Motion and
Supporting Affidavit of Counsel.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

WILLIAM JEROME HARMON

NOTICE OF MOTION

Criminal No. 73-CR-95

S I R:

The defendant moves the Court as follows:

1. To dismiss Counts I, II, IV and VI of the indictment on the ground that said Counts do not state facts sufficient to constitute an offense against the United States as more clearly appears in the affidavit of David M. Garber annexed as Exhibit "A".

2. For an extension of time to move with respect to the indictment and for such other and further relief as to the Court may seem just and proper.

BOND, SCHORNECK & KING

By 

Partner

Attorneys for Defendant
Office and P. O. Address
One Lincoln Center
Syracuse, New York 13202
Tel. (315) 422-0121

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for a hearing before this Court at the Courtroom for the United States District Court for the Northern District of New York in the Main Post Office Building, City of

**Defendant's Notice of Motion and
Supporting Affidavit of Counsel.**

Syracuse, Onondaga County, New York on the 12th day of November,
1973 at 2:00 p.m. of that day or as soon thereafter as counsel
can be heard.

Dated: November 5, 1973

Signed,

BOND, SCHOENECK & KING

By  Partner

Attorneys for Defendant
Office and P. O. Address
One Lincoln Center
Syracuse, New York 13202
Tel. (315) 422-0121

TO: Eugene Welch, Esq.
Assistant U. S. Attorney for
The Northern District of New York
Federal Building
Syracuse, New York 13202

Hon. J. R. Scully
Federal Court Clerk
U. S. District Court,
Northern District of New York
Federal Building
Utica, New York 13503

Hon. Edmund Port
U. S. District Court
Northern District of New York
Federal Building
Auburn, New York 13021

**Defendant's Notice of Motion and
Supporting Affidavit of Counsel.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

AFFIDAVIT

WILLIAM JEROME HARMON

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:
CITY OF SYRACUSE)

David M. Garber, being duly sworn, deposes and says:

1. I am an attorney at law and I am associated with the law firm of Bond, Schoeneck & King.
2. On October 15, 1973 I was appointed by Hon. Edmund Port to represent the defendant, William Jerome Harmon.
3. This affidavit is submitted in support of defendant's motion for an order dismissing Counts I, II, IV and VI of the indictment upon the ground that these counts do not state facts sufficient to constitute an offense against the United States. Further, this affidavit is in support of defendant's motion for an extension of time to move with respect to the indictment.
4. Defendant is charged in Counts I, II, IV and VI of the indictment with impersonating a Sergeant in the United States Air Force and for pretending, in his assumed capacity, to be a Prisoner of War from Viet Nam.
5. Defendant, in Counts I, II, IV and VI, has been indicted under the first arm of 18 U.S.C. 912 which requires two elements: (1) Impersonation of an officer and employee of the United States, and (2) An intent to defraud or to deceive another person.

Exhibit "A"

**Defendant's Notice of Motion and
Supporting Affidavit of Counsel.**

6. Counts I, II, IV and VI of the indictment do not state facts sufficient to constitute an offense against the United States. These counts allege only one element of 18 U.S.C. 912, the element of impersonation, that defendant Harmon:

"willfully and knowingly did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, a Sergeant in the United States Air Force and did falsely take upon himself to act as such in that he falsely stated to William Pennella that he was a Sergeant in the United States Air Force currently on leave, and in such pretended and assumed capacity WILLIAM JEROME HARMON, at the time and place aforesaid did falsely pretend to William Pennella to be a recently returned Viet Nam Prisoner of War."

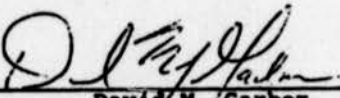
There is no allegation of intent to defraud and, therefore, Counts I, II, IV and VI are insufficient. United States v. Randolph, 460 F.2d 367 (5th Cir., 1972), Form 8, F.R.Cr.P. Appendix of Forms.

7. Defendant has advised me that all of his personal papers are in the possession of his wife, who now resides in Binghamton, Broome County, New York. I have been in contact with John Longeretta, the attorney for defendant's wife, and he has informed me that he will forward such personal papers to me immediately. As of the date of this affidavit, I have not received any papers from Mr. Longeretta, which papers I believe are necessary for defendant's defense and which may serve as a basis for additional motions in this matter.

WHEREFORE, deponent, on behalf of defendant, respectfully prays for an order dismissing Counts I, II, IV and VI of the indictment and granting defendant an extension of time to

**Defendant's Notice of Motion and
Supporting Affidavit of Counsel.**

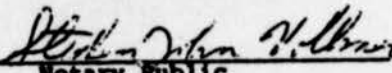
move with respect to the indictment and for such other and
further relief as to the Court may seem just and proper



David M. Garber

Sworn to before me this

5th day of November, 1973



Notary Public

STEPHEN JOHN VOLLMER
Notary Public in the State of New York
Qualified in Onondaga Co. No. 34-0465000
My Commission Expires March 28, 1975

**Government's Response to Motion to Dismiss
Counts I, II, IV and VI.**

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

NOV 9 - 1973

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AT _____ O'CLOCK _____ M.
J. R. SCULLY, Clerk

UNITED STATES OF AMERICA

- against -

WILLIAM JEROME HANCOX

UTICA
GOVERNMENT'S RESPONSE TO
MOTION TO DISMISS
COUNTS I, II, IV and VI

Criminal No. 73-CR-95

The government opposes the defendant's motion to dismiss Counts I, II, IV and VI on the basis that the indictment is sufficient on its face and does contain sufficient allegations.

A brief reading of the case relied upon by the defendant, United States v. Randolph, 460 F.2d 367 (5th Cir., 1972), indicates that that decision by the Fifth Circuit was based upon Hones v. United States, 344 F.2d 798 (5th Cir., 1965), which decided the elements required for the second part of a Section 912 violation rather than the first part, which is the part under which this defendant is presently charged.

18 U.S.C. Section 912 defines two separate and distinct offenses, United States v. Lepowitch, 318 U.S. 702, 704-705 (1943), United States v. Mitman, 459 F.2d 451, 453 (9th Cir., 1972). False impersonation of an officer or employee of the United States is an element of both offenses. The distinctive element of the first offense is acting as the officer impersonated. The distinctive element of the second offense is demanding or obtaining a thing of value. Hones, supra, clearly requires that for the second offense there must be an allegation of intent to defraud.


Government's Response to Motion to Dismiss
Counts I, II, IV and VI.

As to the first offense under Section 912, there is a split among the circuits with the Second Circuit Court of Appeals remaining silent to date. Randolph, supra, is the Fifth Circuit decision requiring that intent to defraud is an essential element of a part one offense. At least two other circuits and one other district court have ruled that intent to defraud is not an essential element. United States -v- Mitman, 459 F.2d 451, 453 (9th Cir. 1972), cert. denied, ^{407 U.S. 867} 465 F.2d 753; United States -v- Guthrie, 387 F.2d 569, 571 (4th Cir. 1967), cert. denied, 392 U.S. 297 and United States v. Harth, 280 F.Sup. 425, 426-427 (W.D. Okla. 1968).

The government respectfully submits that on the basis of the Mitman, Guthrie, and Harth decisions, and in the absence of any controlling decision by the Second Circuit, this court should deny the motion to dismiss Counts I, II, IV and VI.

Dated: November 8, 1973 Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney for the
Northern District of New York
Federal Building
Syracuse, New York 13201
315 473-6660

By: 
EUGENE WALSH
Assistant U. S. Attorney

TO: David M. Garber, Esq.
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Hon. Joseph R. Scully, Clerk
United States District Court
Northern District of New York
Federal Building
Utica, New York 13501

Hon. Edmund Fort
United States District Judge
USPO & Courthouse
Auburn, New York 13021

Minutes of Hearing in Court Below.

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 - against -

5 WILLIAM JEROME HARMON,

6 Defendant.

7 73-Cr-95

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9
10
11 A hearing on a motion to dismiss was
12 held in the above-entitled matter which came
13 on pursuant to notice at the United States
14 District Court held in and for the Northern
15 District of New York, at Syracuse, New York,
16 on November 12, 1973, before HON. EDMUND
17 PORT, United States District Judge for the
18 Northern District of New York.

19 - - - - -
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Minutes of Hearing in Court Below.

2.

A P P E A R A N C E S:

HON. JAMES M. SULLIVAN, Jr., United States Attorney for the Northern District of New York, Federal Building, Syracuse, New York, By: EUGENE WELCH, ESQ., Assistant United States Attorney appearing in behalf of the Government.

- - - - -

(Discussion was held between the Court and Mr. Welch after which the following occurred.)

MR. WELCH: It is our position that simply doing that much, saying "I am the president of the United States" is sufficient under the first part of the statute, the act is such. But in addition in this particular case the question is whether or not the indictment is sufficient. The indictment alleges the act as such. If there is something more required by this defendant to prepare his defense the indictment may still be sufficient. The fact of how the act is such can be in a bill of particulars.

THE COURT: That may be so but I think the authority is against you. When you allege the means I think you are going to be confined to it. And of course under your theory that merely saying that "I am the President of the United States" is acting as such ---

Minutes of Hearing in Court Below.

3.

1 MR. WELCH: Assuming of course someone is there
2 to hear you.

3 THE COURT: Oh, yes. Of course. You can't
4 be talking to yourself. Then I think you can qualify
5 as to some other kind of treatment rather than crimin-
6 al. But I am forced to differ with you in that I
7 think that Congress didn't intend to make it criminal.
8 I don't think they intended to make criminal just
9 play-acting.

10 And in going beyond that, however, and getting
11 to the issue that has been raised and about which
12 there is a variance in the Circuits is the lack of
13 the allegation of intent to defraud.

14 In analyzing the section as it existed prior to
15 the revision, the first and second crimes -- we refer
16 to them as separate crimes -- both were induced by the
17 statements of persons, in substance that intended to
18 defraud by false pretense and so forth. It was taken
19 out. The revisers said in view of Lepowitch, which
20 really what they said was meaningless but it was not
21 that meaningless in Lepowitch because in Lepowitch in
22 fact the indictment did have that phrase in. And I
23 think what the Court did in Lepowitch was say there were
24 two different kinds of fraud involved as between the
25 first and second crimes, but that there was still

1 present the necessity for an intent to defraud.

2 I don't think that I need go into a lengthy
3 explanation on that score. I think it suffices to
4 say I find the Fifth Circuit case United States against
5 Randolph, 460 Fed.2d. 367 (1972) more persuasive than
6 United States against Mitman, 459 Fed. 2d. 451, a
7 Ninth Circuit case I believe ---

8 MR. WELCH: It is either Ninth or Fourth.

9 THE COURT: I think it is Ninth.

10 MR. WELCH: It is the Ninth Circuit.

11 THE COURT: And United States against Guthrie,
12 387 Fed. 2d. 569, the Fourth Circuit case. And for
13 the reasons set out in Randolph I find Counts 1, 2 and
14 4 and 6 defective and the motion to dismiss is granted.

15 A simple order may be prepared.

16 The Clerk should communicate the substance of
17 the order to -- I think I will do this. I am going to
18 ask the Reporter to transcribe my remarks in connection
19 with the decision, file them with the Clerk of the
20 Court together with a copy for assigned counsel.

21 The Clerk of the Court is to forward the copy
22 for assigned counsel to Mr. Garber, with instructions
23 to prepare a simple order dismissing Counts 1, 2, 4
24 and 6. The motion with reference to the remaining
25 counts is granted. Motions may be made returnable

Minutes of Hearing in Court Below.

5.

1 at the next Syracuse motion day of the court.

2 MR. WELCH: Is Your Honor's ruling based on
3 cases which say holding himself out as a Sergeant he
4 must do something beyond that?

5 THE COURT: Sure.

6 MR. WELCH: There are two problems to the ruling
7 that we will have to litigate.

8 THE COURT: It may solve all the problems.
9 All right.

10 - - - - -
11 (Whereupon the above-entitled matter was
12 ended.)
13
14 - - - - -

1
2 REPORTER'S CERTIFICATION
3
4

5 I, F. ROBERT JORDAN, Official Court Reporter
6 for the United States District Court in and for the
7 Northern District of New York, do certify the fore-
8 going to be a true and accurate transcription of
9 the stenographic minutes as taken by me during the
10 aforesaid proceedings.
11

12 F. Robert Jordan,
13 Official Court Reporter

14 Albany, N. Y.
15 November 29, 1973.
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Order of Court Below Dismissing Counts I, II, IV and VI.

At a Motion Term of the United States District Court for the Northern District of New York held at Syracuse, New York on the 12th day of November, 1973

PRESENT: Hon. Edmund Fort, District Judge Presiding

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

-against-

WILLIAM JEROME HARMON

ORDER

Criminal No.

73-CR-95

The defendant having moved for an order to dismiss Counts I, II, IV and VI of the indictment on the ground that said Counts do not state facts sufficient to constitute an offense against the United States and for an order for an extension of time to move with respect to Counts III and V of the indictment, and said motion having come on to be heard before this Court on the 12th day of November, 1973,

NOW, upon reading the indictment and the motion papers of the defendant, dated November 5, 1973, including the affidavit of David M. Garber, Esq., and the responsive memorandum of the United States Attorney for the Northern District of New York, and after hearing Eugene Welch, Esq., Assistant United States Attorney for the Northern District of New York, in opposition to defendant's motion, and due deliberation having been had, it is

ORDERED that the said motion be, and the same hereby is granted and it is further



Order of Court Below Dismissing Counts I, II, IV and VI.

ORDERED that Counts I, II, IV and VI of the indictment be dismissed and that a judgment dismissing said Counts of the indictment be entered by the Clerk of this Court and it is further

ORDERED that defendant have an extension of time until January 14, 1974 to move with respect to Counts III and V of the indictment.

Dated:

S/Edmund P. T.
District Judge

ENTER:

Auburn, N. Y.
December 15, 1973